No. 14,917

In the

United States Court of Appeals

For the Ninth Circuit

California State Board of Equalization,
Appellant,

vs.

George T. Goggin, Trustee of the Estate of Columbia Stamping and Manufacturing Corporation, Bankrupt,
Appellee.

Appellant's Reply Brief

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I.

INTRODUCTORY STATEMENT

There is no factual dispute in this case since the appellee has accepted the statement of the case as set forth in Appellant's Opening Brief. The Brief of Appellee has failed to come to grips with the issues discussed in Appellant's Opening Brief, and, for the most part, does not undertake to discuss the cases cited therein. Moreover, the Brief of Appellee seeks to raise a number of issues which have no

relevance in the disposition of the case here involved. It will be shown in the discussion which follows that the arguments of appellee are without merit.

II.

THE BANKRUPTCY COURT HAS NO JURISDICTION TO ENJOIN THE STATE OF CALIFORNIA FROM COLLECTING A USE TAX DIRECTLY FROM PERSONS USING PROPERTY PURCHASED FROM A TRUSTEE IN BANKRUPTCY.

In Appellant's Opening Brief, at pages 13 to 15 inclusive, it was pointed out that in the instant case the bankruptcy court had exceeded its jurisdiction by attempting to enjoin the collection of the California use tax from the Milton J. Wershow Company, the purchaser of the personal property here involved, because of the Company's storage and use of the property in this State since the bankruptcy court had lost jurisdiction of the property nine months earlier when it ceased to be part of the bankrupt estate (*In re Oak Park Cleaners and Dyers,* 125 Fed. 2d 420, 422 (Seventh Circuit); *In re Krull,* 295 Fed. 520, 521 (Dist. Ct., Eastern Dist., New York); and see *Oklahoma Tax Commission v. Texas,* 336 U.S. 342 at 353, 69 S.Ct. 561, 567.).

In the Brief of Appellee, the cases relied on by appellant are neither cited nor discussed. Instead the appellee attempts to show that the power to enjoin the State of California from taxing the use of property which has ceased to be a part of the bankrupt estate is derived from the jurisdiction of the bankruptcy court to adjudicate the duties of the trustee with respect to the collection of the tax. To support this rather startling proposition, appellee relies on cases such as *Reconstruction Finance Corporation v. Riverview State Bank,* 217 Fed. 2d 455, and *Central States v. Luther,* 215 Fed. 2d 38, holding that a bankruptcy court may adjudicate the conflict-

ing rights of third parties to property if doing so is necessary in order to administer the bankrupt estate. These cases have no application in the instant case, however, since not only are we not here concerned with the conflicting property rights of third parties, but in addition, it clearly is not necessary in order for the trustee to administer the estate of the bankrupt, that the State be enjoined from collecting a use tax from the Milton J. Wershow Company. As pointed out at pages 9, *et seq.* of Appellant's Opening Brief, the California use tax is imposed on the purchaser for the privilege of using tangible personal property in this State. Therefore, if the State collects the tax directly from the purchaser, the liability for the tax will be discharged and the administration of the bankrupt estate will not be affected in any manner whatsoever. It follows that the administration of the bankrupt estate does not require that the State be barred from collecting from persons who are not parties to the bankruptcy proceedings, use taxes imposed for the privilege of using property after it has ceased to be a part of the bankrupt estate.

Under the reasoning advanced by appellee, a bankruptcy court would have jurisdiction to enjoin the collection of all taxes arising after property ceased to be part of a bankrupt estate, including real and personal property taxes, since the bankruptcy court would have jurisdiction to determine the liability, if any, of the trustee for the collection of such taxes. It is respectfully submitted that this is not the law, and that in the instant case the bankruptcy court was without jurisdiction to enjoin the State of California from collecting a use tax from the Milton J. Wershow Company because of that Company's use in this State of tangible personal property purchased from George T. Goggin, the appellee.

III.

A TRUSTEE IN BANKRUPTCY WHO HAS BECOME A RETAILER BY VIRTUE OF MAKING A SERIES OF RETAIL SALES DOES NOT CEASE TO BE A RETAILER WHEN HE LIQUIDATES THE ASSETS OF THE BANKRUPT ESTATE.

The California use tax is imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer (Revenue and Taxation Code, Section 6201 *et seq.*). Although there is no dispute between the parties that in the period in which the appellee, George T. Goggin, was operating the business of the Columbia Stamping and Manufacturing Corporation, he was a retailer by virtue of making numerous retail sales of personal property, appellee contends that he was not a "retailer" at the time he made the sale here in controversy since this was a sale in liquidation. Appellee states that *California State Board of Equalization v. Goggin,* 191 Fed.2d 726, so holds.

The arguments which appellee seeks to base on the decision of this Court in *California State Board of Equalization v. Goggin, supra,* are fatally defective because appellee overlooks the fact that the decision of this Court as to the meaning of the term "retailer" was based on an interpretation of California law which subsequent decisions of the California courts have shown to be incorrect. In addition, the question of unconstitutionality with which this Court was concerned in the *Goggin* case related to the imposition of a tax on a trustee in bankruptcy, liquidating the assets of an estate, and is not presented in this case involving as it does the taxation of a private person who was not a party to the bankruptcy proceeding.

This Court, in its opinion in *California State Board of Equalization v. Goggin, supra,* stated initially:

> "The construction of the California tax is a matter of state law which is binding upon us." (191 F.2d 726, at 729)

The opinion then reviewed the decisions of the California appellate courts in an effort to determine whether a retailer is "engaged in business" within the meaning of the California Sales and Use Tax Law when he is liquidating his business assets. At the time the *Goggin* case was decided this matter had not been passed upon directly by the California courts. This Court concluded, however, that the existing California precedents seemed to indicate that under California law a retailer who begins to liquidate his business ceases to be "engaged in business" and, therefore, is not a retailer with respect to the business assets he is liquidating. Two opinions of the California courts which were issued subsequent to the decision in *California State Board of Equalization v. Goggin, supra,* reach a contrary conclusion and squarely hold that a retailer who is liquidating his business assets is "engaged in business" within the meaning of the Sales and Use Tax Law and, therefore, he retains his status as a retailer with respect to the assets which he is liquidating (*Market Street Railway Company v. State Board of Equalization,* 137 A.C.A. 100, 290 Pac.2d 20, and *Sutter Packing Company v. California State Board of Equalization,* 139 A.C.A. 983, 294 Pac.2d 1083 [Hearing denied by the Supreme Court of California]). These cases are more fully discussed at pages 17 through 20 inclusive of Appellant's Opening Brief, where it is pointed out that the California courts considered and rejected arguments by the taxpayers that the decision of this court in *California State Board of Equalization v. Goggin,* 191 Fed.2d 726 should be followed. Appellee has apparently failed to appreciate the significance of the decisions in the *Sutter Packing Company* and *Market Street Railway* cases, *supra,* since he attempts to brush them aside on the ground that they are not relevant to the problem presented by this case.

Moreover, the constitutional considerations involved in *California State Board of Equalization v. Goggin, supra,* are not presented in this case. In reaching its decision in the Goggin case, this Court was concerned with avoiding a construction of the California law which would render the California statute unconstitutional. This Court apparently concluded that an interpretation of the Sales and Use Tax Law which would result in the imposition of a sales tax on a trustee in bankruptcy liquidating the assets of a bankrupt estate would constitute such an interference with the performance of the trustee's duties as to render the California statute unconstitutional. Appellee has failed to note that no such constitutional considerations are presented in this case since we are here concerned with a use tax imposed on the purchaser and not with a sales tax imposed on a liquidating trustee. Since the imposition of a tax on the purchaser, does not interfere with the bankruptcy trustee's performance of his duties in liquidating an estate (*New York v. Jersawit,* 85 Fed.2d 25 [Second Circuit]), there are no constitutional inhibitions against regarding a trustee in bankruptcy as a retailer in the instant case.

It is to be noted that appellee has failed to discuss the additional definition of retailer found in Section 6019 of the California Revenue and Taxation Code, enacted in 1951, which was not in effect in the period involved in *California State Board of Equalization* v. *Goggin, supra.* Section 6019 expressly provides that a trustee in bankruptcy making more than two retail sales in any twelve month period is a retailer.

Appellee attempts to derive some comfort from the fact that since 1943 there has appeared in the Revenue Laws of California, published by the State Board of Equalization, an annotation which summarizes the holding in *State Board*

of Equalization v. Boeteler, 131 Fed. 2d 386, and that some years later a citation to *State Board of Equalization v. Goggin, supra,* was included without comment in that publication under the heading "Trustee in Bankruptcy as 'retailer'." Since the position of the Board of Equalization with respect to the status of a trustee in bankruptcy as a retailer is clearly set forth in Appellant's Opening Brief, and since this Court is obviously not concerned with how an employee of the Board of Equalization may have summarized the holding in the *Boeteler* case, *supra,* the annotation referred to by appellee is completely irrelevant in this proceeding.

IV.

THE MILTON J. WERSHOW COMPANY IS SUBJECT TO THE USE TAX BECAUSE OF ITS STORAGE AND USE OF TANGIBLE PERSONAL PROPERTY IN CALIFORNIA. THE PURCHASE OF THIS PROPERTY DOES NOT SATISFY THE REQUIREMENTS OF ANY OF THE EXEMPTIONS FROM THE CALIFORNIA USE TAX.

A. The Exemption from Use Tax Contained in Section 6352 of the California Revenue and Taxation Code is Confined to Situations in Which This State Cannot Constitutionally Impose the Use Tax.

Section 6352 of the California Revenue and Taxation Code provides in essence that the California sales tax is not applicable in situations in which the imposition of a sales tax would violate the state or federal constitution and, in like manner, that the California use tax is not applicable in situations in which the imposition of a use tax would violate the state or federal constitution. Appellee asserts, however, that Section 6352 is intended to exempt from the use tax all transactions to which the sales tax may not be constitutionally applied. Not only does this suggested construction of the section find no support in its language, but it completely ignores the legislative history of Section 6352,

which resolves all doubt as to the fallacy of appellee's position. Moreover, as will be subsequently shown, the construction suggested by appellee would result in the virtual elimination of the California use tax which was enacted for the very purpose of taxing transactions to which the sales tax could not be constitutionally applied.

Section 6352 is merely a codification of parallel provisions which were contained in the Retail Sales Tax Act of 1933, and the Use Tax Act of 1935. Section 5(a) of the Retail Sales Tax Act provided a sales tax exemption for:

> "The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

Section 4(b) of the Use Tax Act provided:

> "Sec. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:
>
> * * * * * * *
>
> (b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

By California Stats. 1941, Ch. 36, p. 532, the Legislature adopted as Division 2, part 1 of the Revenue and Taxation Code the codification of the Retail Sales Tax Act and of the Use Tax Act which together were to be known as the California Sales and Use Tax Law. The codification was to be effective July 1, 1943. This codification combined the two exemptions referred to above in Section 6352 which provides as follows:

"There are exempted from the taxes imposed by this part the gross receipts from the sale of and *the storage, use, or other consumption in this State of tangible personal property* the gross receipts from the sale of which, or *the storage, use or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State."* (Emphasis added.)

It is to be noted that the italicized portion of this section is almost identical in content with Section 4(b) of the Use Tax Act which is quoted above. The codification of the exemption formerly found in Section 5(a) of the Retail Sales Tax Act is also readily discernible. Moreover, any doubt that the Legislature, in adopting the codification, intended to continue the exemption from the use tax found in Section 4(b) of the Use Tax Act is removed by a consideration of the fact that at the 1941 session of the Legislature, in the process of amending various provisions of the Use Tax Act which was to remain in effect until the effective date of the codification, the Legislature re-enacted without change Section 4(b) of the Use Tax Act quoted above (Calif. Stats. 1941, ch. 247, sec. 16, p. 1335).

Moreover, the codification of this portion of the Revenue and Taxation Code was prepared by the California Code Commission. The Code Commission reported to the Governor and the Legislature that in preparing this codification it did not intend to make any substantive change in the law (California Code Commission, Final Report 1953, p. 12). In addition, in California, it is presumed that the codification of a statute is not intended to effect a substantive change in the law. *Sobey v. Molony,* 40 Cal. App. 2d 381, 385, 104 P.2d 868, 870; *Southern California Jockey Club v. California, etc. Racing Board,* 36 Cal. 2d 167, 173, 223 P.2d

1, 5). It is thus apparent that Section 6352 merely combined and codified the parallel exemptions contained in the two taxing acts and did not extend or enlarge the exemptions.

Appellee apparently does not recognize that if its contentions were correct, it would virtually eliminate the use tax which was designed for the very purpose of imposing a tax on purchasers under circumstances in which a sales tax on the seller would be barred for constitutional reasons; For example: if an automobile is purchased by a California resident from a dealer in Nevada, California could not constitutionally impose a sales tax on the Nevada dealer; but California does collect a use tax from the California purchaser. The very purpose of enacting the California use tax was to avoid discrimination against local suppliers by applying an equal tax burden on goods purchased outside of California (*Chicago Bridge & Iron Co. v. Johnson,* 19 Cal. 2d 162, 165; 119 P.2d 945, 947; *Southern Pacific Company v. McColgan,* 306 U.S. 167, 59 S.Ct. 389). The *Southern Pacific* case *supra,* upholds the application of the California use tax on the use in California of property constitutionally exempt from the sales tax. In its decision, the Court recognizes the purpose of the use tax in complementing the California sales tax. (See, also, "The California Use Tax" by Justice Traynor in 24 Cal. L. Rev. 175, discussing the application of the California use tax to sales constitutionally exempt from the California sales tax.)

B. Section 6402 of the Revenue and Taxation Code Does Not Exempt from the Use Tax Property Purchased from a Trustee in Bankruptcy.

Appellee suggests that the sale here involved may be exempt under Section 6402 of the Revenue and Taxation Code which provides:

"*Property purchased from United States.* The storage, use, or other consumption in this State of property purchased from any unincorporated agency or instrumentality of the United States, except (a) any property reported to the Surplus Property Board of the United States, or to any agency succeeding to the functions of that board, as surplus property by any owning agency and (b) any property included in any contractor inventory, is exempted from the use tax.

'Surplus property,' 'owning agency,' and 'contractor inventory' as used in this section have the meanings ascribed to them in that act of the Congress of the United States known as the 'Surplus Property Act of 1944.' "

This code section relates to the sale of property *owned* by the United States and its unincorporated agencies and instrumentalities as evidenced by the incorporation therein by reference of the definition of "owning agency" as set forth in the Surplus Property Act of 1944. Section 6402 was enacted to avoid, for purposes of administrative convenience, the imposition of a use tax on the purchase of publications and other minor items from departments of the federal government, such as the Department of Commerce, or the Department of Labor, since the cost of collecting a use tax thereon would far exceed the revenue produced. On the other hand, sales of surplus property and sales of property owned by incorporated agencies, such as the Reconstruction Finance Corporation, which generally were of sufficient magnitude to warrant the imposition of a use tax on the purchaser, were excluded from the exemption.

At the time of the enactment of Section 6402, there was in effect an administrative regulation of the Board of Equalization defining unincorporated instrumentalities of the

United States with respect to the exemption from the sales tax found in Section 6381 of the Revenue and Taxation Code which stated:

> "* * * B. *Unincorporated Instrumentalities.* Tax does not apply to sales to the Departments of the United States such as the War and Navy Departments, and to the various unincorporated offices, agencies, and establishments of the government." (Ruling 54, 18 Calif. Admin. Code Section 2014)

The Legislature, when it adopted Section 6402, was presumably aware of this administrative interpretation of the terms "agency" and "instrumentality" of the United States and intended to adopt the Board's definition of these terms. It is obvious from this definition that the terms "agencies" and "instrumentalities" of the United States were intended to encompass established agencies and permanent organizations of the federal government, and were not intended to apply to a trustee appointed to administer private assets pursuant to the provisions of the bankruptcy act. (See *Frates v. Oklahoma Tax Comm.*, 178 Okla. 189, 62 P.2d 514, holding that a federal receiver is not a "federal instrumentality" for State tax purposes.)

It is apparent that Section 6402 does not apply to privately owned property sold by a trustee in bankruptcy. This section certainly did not contemplate that privately owned property which was purchased for use in this State was to be exempt from the use tax merely because it was purchased from a trustee in bankruptcy who was administering the assets of a private corporation for the benefit of its creditors. It is, of course, axiomatic that exemptions from taxation are to be strictly construed (*Cypress Lawn Cemetery Assn. v. San Francisco,* 211 Cal. 387, 295 P.2d 813).

It should be noted that in Section 6005 of the Revenue and Taxation Code which defines the term "Person", there is a separate reference to "trustee in Bankruptcy" and to "the United States" which demonstrates that the two terms are not used synonymously in the California Sales and Use Tax Law. It is obvious, moreover, that if the Legislature had intended to regard a trustee in bankruptcy as an agency or instrumentality of the United States and to grant an exemption to purchasers from a trustee, it would not have expressly included a trustee in bankruptcy within the definition of retailer which is found in Section 6019 of the California Revenue and Taxation Code.

C. The Sale Here Involved Was Not Exempt as an Occasional Sale Within the Meaning of the California Sales and Use Tax Law.

It is alleged by appellee that the sale here involved is exempt as an occasional sale within the meaning of Section 6006.5(a) of the Revenue and Taxation Code which provides:

> " 'Occasional sale' includes:
>
> (a) A sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit, provided such sale is not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit; * * *

Appellee asserts that since under the holding of *California State Board of Equalization v. Goggin,* 191 Fed. 2d 726, a seller's permit is not required by a trustee making liquidation sales, it follows that the sale here in controversy was exempt as an occasional sale. It is apparent that appellee has failed to analyze the language of Section 6006.5(a). This section excludes from the definition of

occasional sale, the sale of property used by a retailer* in making retail sales, an activity for which he is required to hold a seller's permit (Revenue and Taxation Code, Sec. 6066).

In 1947, shortly after the enactment of Section 6006.5, the Board of Equalization published Ruling 81 (18 Calif. Admin. Code, Section 2101) which points out that Section 6006.5(a) excludes from the definition of an "occasional sale" the sale by a retailer of property used in connection with his retail selling activity such as show cases, and office or delivery equipment. In other words, when a person has, by virtue of carrying on retail selling activities, become a retailer, the sale of that portion of his capital assets which is in the form of tangible personal property and which was used in connection with his retail selling activity, is not exempt from taxation as an "occasional sales" under Section 6006.5(a). Therefore, if a trustee in bankruptcy, who has become a retailer by virtue of making retail sales while operating the business of the bankrupt, sells assets which he used in connection with this retail selling activity, the transaction is not exempt from taxation as an occasional sale. It is immaterial under the terms of Section 6006.5(a) that the liquidation of the assets was not the type of activity which taken by itself would require the trustee in bankruptcy to obtain a seller's permit.

In the instant case, the property which was sold was held and used by George T. Goggin, the appellee, for a period of

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*Under the California Sales and Use Tax Law, every retailer is a seller since a seller is defined in Section 6014 as follows:

> "'*Seller*'. 'Seller' includes every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax."

And the term "retailer" is defined in Section 6015(a) as follows:

> "'*Retailer*'. 'Retailer' includes:
>
> (a) Every seller who makes any retail sale or sales of tangible personal property, * * *"

seven years in the course of conducting the affairs of the bankrupt. During this period the appellee was a retailer and this property was used in connection with an activity requiring the holding of a seller's permit, namely, the making of numerous retail sales of tangible personal property (Tr. 51, 52, 101). It follows that since the property here involved was "held or used" by the appellee in the course of an activity for which a seller's permit was required, its sale is not exempt as an occasional sale under the provisions of Section 6006.5.

V.

TO REQUIRE GEORGE T. GOGGIN TO COLLECT THE USE TAX FROM THE MILTON J. WERSHOW COMPANY WOULD NOT INTERFERE WITH THE PERFORMANCE OF HIS FUNCTIONS AS A TRUSTEE IN BANKRUPTCY.

At pages 22 through 27 inclusive of Appellant's Opening Brief, it is shown that the collection of the use tax by the appellee, George T. Goggin, would not interfere in any way with the performance of his functions as a trustee in bankruptcy. It is there pointed out that in *New York City v. Jersawit,* 85 Fed. 2d 25 (Second Circuit) it was expressly held that the collection by a trustee in bankruptcy, liquidating the assets of a bankrupt estate, of a tax on purchasers would not interfere with the performance of the trustee's official functions. The court in the *Jersawit* case distinguished this situation from one in which the tax is imposed, not on the purchaser, but on the liquidating trustee. In the latter situation, the court in the *Jersawit* case indicated that the tax would burden the trustee in performing his official functions. It is apparent, therefore, that the *Jersawit* case is completely consistent with the holding of this court in *California State Board of Equalization v.*

Goggin, 191 Fed. 2d 726. It was pointed out in Appellant's Opening Brief that direct support for appellant's contention is also furnished by *Colorado National Bank v. Bedford,* 310 U.S. 41, 60 S.Ct. 800, upholding the validity of a Colorado statute requiring the *collection* by national banks of a tax on depositors measured by the charges for the bank's safe deposit service although there were constitutional inhibitions against imposing the tax on the bank itself. Appellee has declined to discuss or even mention either *New York City v. Jersawit, supra,* or *Colorado National Bank v. Bedford, supra,* in its brief.

Appellee, in attempting to show that the collection of a use tax would interfere with the performance of the trustee's functions is forced to ignore the facts of the instant case and to assume a hypothetical situation in which the purchaser gave the trustee in bankruptcy a resale certificate and subsequently made use of the items purchased. Appellee asserts that a trustee would, under such circumstances, have to keep an estate open indefinitely in order to be able to collect the use tax. Of course, no such problem is presented in this case since no resale certificate was given by the purchaser and it is conceded by appellee that in the instant case the property here involved was purchased for use in California.

Moreover, the situation posed by appellee would not present any real problem to a trustee in bankruptcy since the appellant, Board of Equalization, has never contended, nor is it here contended that a bankrupt estate otherwise ready to close must be kept open for the purpose of ascertaining whether property not subject to the use tax at the time of sale was subsequently stored or used in this state in a manner which renders the purchaser liable for the use tax. Section 6203 of the Revenue and Taxation Code provides for the collection of a use tax by a "retailer maintaining a place

of business in this State." It is apparent that the reasonable interpretation of this provision (and the interpretation followed by the appellant) is that a retailer is only obligated to collect use tax from his vendees as long as the retailer is maintaining a place of business in this state. It is obvious that when a bankrupt estate is closed and the trustee discharged, his duties under Section 6203 come to an end.

In addition, it is the practice of the Board of Equalization to collect the tax from the purchaser and not the retailer if the retailer has taken a resale certificate in good faith and the purchaser then uses the property rather than reselling it.

CONCLUSION

It is respectfully submitted that the arguments of appellee are without merit and that, for the reasons set forth herein and in Appellant's Opening Brief, this case should be reversed and remanded with instructions to the District Court that the order of the referee in bankruptcy be set aside and that the appellant, California State Board of Equalization, be permitted to enforce the provisions of the California Use Tax Law with respect to the transaction here involved.

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